84-96

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

INLAND MARINE INDUSTRIES, RUDY SUTTON, DOUGLAS SUTTON, and STANLEY SUTTON,

PETITIONERS,

v.

FLETCHER L. HOUSTON,

RESPONDENT.

On Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

# PETITION FOR WRIT OF CERTIORARI

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July 5, 1984

## QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a Title VII wage discrimination case fully tried on the merits, the Ninth Circuit Court of Appeals erred in affirming the district court's prima facie case and burden-shifting analysis rejected by this Court in United States Postal Service Board of Governors v. Aikens, 460 US ____, 103 S. Ct. 1478, 75 L.Ed.2d 403 (1983).

2. Whether, in the absence of any other evidence that disparities in wages between certain black and white employees were the result of intentional discrimination, the mere fact of an employer's refusal to eliminate the disparities renders them unlawful per se.

## LIST OF PARTIES

The parties are Fletcher L. Houston and Rudy Sutton, dba Inland Marine

Industries. Mr. Houston was the plaintiff at the trial level, the appellee in the Court of Appeals, and is the Respondent here. Mr. Sutton was the defendant at the trial level, the appellant in the Court of Appeals, and is the petitioner here.

The Equal Employment Opportunity Commission was a plaintiff at the trial level, but settled with Sutton before the trial ended and was dismissed. The named defendants Douglas Sutton and Stanley Sutton were never served and never appeared as parties. Douglas Sutton testified at the trial.

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## GROUNDS FOR JURISDICTION IN THE SUPREME COURT

Jurisdiction in the United States Supreme Court is based on 42 USC §1254(1). Petitioner seeks review of the Opinion of the United States Court of Appeals for the Ninth Circuit entered on April 5, 1984.

## PROVISIONS IN QUESTION

42 USC §1981:

> "All persons within the jurisdiction of the United States shall have the same right in every State... to make and enforce contracts... and to the full and equal

> benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens...."

Section 703(a)(1) of the Civil Rights Act of 1964, 42 USC §2000e-2(a)(1):

> "It shall be an unlawful employment practice for an employer to discriminate against any individual with respect to his compensation... because of such individual's race...."

## STATEMENT OF THE CASE

Based upon a prima facie case and burden-shifting analysis rejected by this Court, a $268.85 wage disparity has been labelled unlawful, and Petitioner's integrity has been impugned.

Petitioner Inland Marine Industries ("Inland Marine"), a sole proprietorship of Rudy Sutton, was engaged in the business of fabricating or buying furnishings for vessels and selling them primarily to the United States Navy. During

1980, Inland Marine had a large order for berths. In order to assemble the component parts, Rudy Sutton rented a warehouse and placed his son, Douglas Sutton, in charge of the assembly operation. The assembly operation ran from mid-March, 1980, through June, 1980, at which time the order was filled, and the operation ceased.

Employees from other parts of the company were temporarily transferred into the operation. In addition, ten new employees were hired for the temporary operation. The first three were hired by Douglas Sutton. Each was white. Douglas Sutton assigned each a wage rate of $5.00 per hour, based on individual and separate considerations. The specific reasons for the wage rates assigned to these three employees were not discussed by either lower court as a reason for concluding that Inland Marine had discriminated.

Early in April, Rudy Sutton ordered Douglas Sutton to speed up production by hiring more people and to obtain the additional people from the California Employment Development Department ("EDD"). Douglas asked how much he should pay. Rudy said he would let Douglas know. Rudy conferred with two managers from other parts of his business. The three of them were in disagreement, but compromised on a starting rate of $4.50 per hour. Douglas Sutton was not consulted; he was merely advised of the result. The order was put in to EDD, with $4.50 per hour specified as the rate.

A total of six applicants was referred by EDD. Each was black. Each was hired at the assigned rate of $4.50. Their races were not known at the time the rate of $4.50 was decided upon. Nor was there evidence that EDD referrals were more likely to involve one race than another.

Between hiring the first three EDD applicants and hiring the final three, Douglas Sutton hired John Marksman, a white, who had been referred by Douglas' brother. Douglas told Marksman the starting rate was $4.50. The next day Marksman worked 17 hours. Douglas described it as follows:

> "Well, the berths were flying. I mean, he'd run over to one pile, pick up a berth, he was so strong the thing would be on top of his head. He'd be running over to the next table, set it down. He'd push the drill right through the holes, through the thing, and throw it up on the next stack. he was an incredible worker." RT 302:15-20.

> "I told him at the end of the day, look, I told you I was going to hire you at $4.50. I told him we just set a policy, I am not supposed to give you any more than $4.50. If you are working like that, that's not fair. I am going to start you at $5.00. And I did have an argument with my

father about that."
RT 304:9-14.

"He [the father] said, what is this $5. I just told you that we are hiring people at $4.50. And I explained the situation to him, and he's busy, he doesn't want to hear what I'm doing. I said, wait a minute, Dad, this guy, I mean, it's not fair to pay this guy $4.50 an hour. I am talking this guy is a dynamo. If you came over and saw him work you'd pay him fifteen. I said I'm asking just 50 cents more, and he said, Douglas, don't do this. So, he finally agreed." RT 305:10-18.[1]

Neither the trial court nor the Court of Appeals referred to the specific reason for assigning Marksman $5.00 per hour in its discussion of its ultimate conclusion that Inland Marine had discriminated. To

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[1]The Court of Appeals' statement that Douglas Sutton let Marksman work before setting his rate is not correct. The sole evidence on the record is as stated herein.

the contrary, the District Court went out of its way to make the following comments:

> "The Court recognizes and finds that Doug Sutton is a fine person, that he did not personally discriminate against any blacks. I think the evidence militates against such a finding...." RT 450:22-25 (emphasis added), Appendix, p. 11-B.

> "The Court wants to make it very clear to Mr. [Rudy] Sutton, Sr., that the Court does not find that there was a direct plan, scheme or design to discriminate against blacks..... And the Court is not finding that the company actively set out a plan to discriminate against blacks, because there is no evidence of that." RT 454:23 - RT 455:5, Appendix, pp. 17-B, 18-B.

> "[T]he evidence exonerates foreman Douglas Sutton ...." Opinion, and Order p. 3:15-16, Appendix, p. 24-C.

> "The Court... found no culpability on the part of Douglas Sutton, the

> foreman who was primarily responsible for determining wages, and no scheme or plan on the part of the company to discriminate." Opinion and Order, p. 1:27-29, Appendix, p. 20-C.

Sometime after Marksman had been hired, two of the black employees who had been referred by EDD complained to Douglas Sutton about being paid $.50 per hour less than white employees. One of the complaining employees was the plaintiff, Fletcher L. Houston. Douglas' response was to request $.25 per hour raises for the two men from his father, but, when he told the men about the $.25 raises, they complained it was not enough. Rather than return to his father for additional raises, Douglas decided to pay them out of his own pocket. Douglas described it as follows:

> "I approached my father with the raises, and right away he says 'What are you giving raises for right now?' He says, 'The job is almost

done.' He says, 'This is temporary....'

"[A]nd he goes, 'I don't want to give raises here.' He said, 'I can get the same job for $4.50....' He said, 'Fire them and get somebody else.'

"And I told him, 'I don't want you to fire them right now.' I said, 'Come on, I got three more weeks left of the job, I don't want to fire them.'

"I said, 'They know what they're doing. I'm going to have to train somebody else, take them a week to train and we work for two weeks....'

"He finally agreed to that 25 cent raise. And when these guys guffawed at the 25 cent raise, what am I going to do, go back and, you know, ask him for more? So, I said, forget it. I just made the difference myself....

"I was just directly addressing their complaint. I mean, that's what their complaint, how come Marksman is getting this? I had reasons why

> Marksman was getting what he was getting paid. But, I just, you know, put it to rest right there. I said, 'Okay.' That's it." RT 108:7 -RT 109.13.

At the conclusion of the trial, the district court ruled from the bench that Inland Marine had discriminated on the basis of race. The court did not say that any representative of Inland Marine had intended to discriminate. The court's ruling was based on its absolute unwillingness to accept disparities in wages, and the ruling was made without regard to any consideration of intent to discriminate:

> "With respect to the Title VII claim..., the Court finds that in order for Plaintiff to establish a showing of a violation under Title VII, he must show that persons of one race are treated differently than similarly situated persons of another race.
>
> "The evidence shows that Mr. Houston is a black man, and that there were other employees, black

and white, and that there was a disparity in the wages between the blacks and the whites.

"In addition to showing what I have indicated for a Title VII action, the plaintiff must show that the defendant has no adequate explanation for the difference in the disparity and wage treatment.

"The Court finds that plaintiff has established a prima facie case of employment discrimination based upon wage disparity."

"The defendant then has the burden of going forward with he evidence to rebut the inference of racially-based wage disparities, because there has been established a prima facie case by the plaintiff.

"The Court finds that the defendant has failed to meet that burden of justification. In other words, the defendant has failed to articulate legitimate reasons for the disparity in wages between the blacks and the whites." Tr. 448:25- Tr. 450:14

(emphasis added), Appendix, pp. 9-B, 10-B.

"And the Court is not finding that the company actively set out a plan to discriminate against blacks, because there is no evidence of that.

"But the law sets forth certain requirements that there should be some criteria for the proper determination of which employees receive which kind of salary. And the result just came out the wrong way here." Tr. 455:3-9 (emphasis added), Appendix, pp. 17-B, 18-B.

On a motion for reconsideration, defendant Inland Marine argued that the court could not find discrimination based on a theory of disparate treatment in the absence of a finding of an intent to discriminate. The Court's Order denying the motion demonstrated that that was exactly what the court had done:

"The company did not consciously set out to establish a two-tiered wage structure...;

> however, it cannot escape responsibility for the maintenance of the structure. The disparate wage structure developed over time, but defendant had been duly informed of this obvious disparity. Derendant had ample opportunity to adjust and correct the disparity, yet defendant acquiesced therein and chose to maintain it." Opinion and Order, p.3: 18-27, Appendix, p. 24-C.

Inland Marine appealed to the Court of Appeals for the Ninth Circuit pursuant to 42 U.S.C. §2000e-5(j) and 28 U.S.C. §1291, but the Court of Appeals affirmed in an opinion certified for publication. Recognizing that Inland Marine was liable, if at all, under a theory of disparate treatment and that a finding of intentional discrimination was essential to a case tried on a theory of disparate treatment, the Court of Appeals found the requisite intent to discriminate in the sole fact that Douglas Sutton had failed to bring

the wages of his black employees in line with those of his white employees after the disparaties has been brought to his attention:

> "The requisite intent lay in Douglas Sutton's two-time refusal, at his father's behest, to bring the blacks' hourly wages in line with those of whites. When Houston and a co-worker first complained, Sutton raised their wages 25¢ per hour--still 25¢ short of the wages he paid white workers. Later, when the two black men complained again, Sutton paid them out of his own pocket, but simultaneously raised at least one other white worker 50¢. And in any event, when Sutton did act, he confined his action to satisfying only the men who complained. At no time did he or his father attempt to institute across-the-board changes to correct a systemic inequity in wages.
>
> "By refusing to change his subjective wage-setting policies or to bring black wages in

line with those of whites, Sutton ratified the existing disparities. His ratification constituted all the intent the court needed to find Inland Marine guilty on a disparate treatment theory." Opinion, p. 13:3-20, Appendix, pp. 46-D, 47-D.

## BASIS FOR TRIAL COURT JURISDICTION

Jurisdiction in the trial court was based on section 706(f)(3) of the Civil Rights Act of 1964, 42 USC §2000e-5(f)(3), and 28 USC §1343.

## ARGUMENT

### 1. The Ninth Circuit Court of Appeals' Adherence To The Prima Facie And Burden-Shifting Analysis Is In Direct Conflict With Applicable Decisions of This Court.

In Peters v. Lieuallen, 693 F.2d 966 (9th Cir. 1982), the Court of Appeals

for the Ninth Circuit reversed a judgment for an employer under Title VII of the Civil Rights Act and remanded for retrial. In its instructions for the trial court on remand, the Court of Appeals wrote that the trial court was first to determine whether the plaintiff had made out a prima facie case, and:

> "Should the district court find on remand that a prima facie case was made out, it should then proceed through the Title VII analysis and determine whether any legitimate, nondiscriminatory reasons for the Board's conduct were offered, and, if so, whether these reasons were the true reasons or merely pretextural." 693 F.2d at 969.

This Court's subsequent discussion in United States Postal Service v. Aikens, 460 US ____, 75 L.Ed.2d. 2d 403 (1983), is contrary to Peters v. Lieuallen. This Court wrote:

> "Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a prima facie case. We think that by framing the issue in those terms, they have unnecessarily evaded the ultimate question of discrimination vel non." 75 L.Ed.2d at 409.

Aikens was followed in Lehmar v. Trout, ____ US ____, 79 L.Ed.2d 732 (Feb. 27, 1984).

Notwithstanding Aikens and Lehmar, however, the Ninth Circuit reaffirmed Peters v. Lieuallen in the case at bar:

> "To the extent the district court spoke of finding a prima facie case, it did so because this Circuit requires district courts to provide such specific findings in Title VII cases. See, e.g., Peters v. Lieuallen, 693 F.2d 966, 969 (9th Cir. 1982, emphasis added)." Opinion, p. 12:5-9, Appendix, p. 44-D.

The district court's erroneous use of a prima facie case and burden-shifting analysis in this action prejudicially affected the outcome. Following the conclusion of the trial, the district court found that "plaintiff ha[d] established a prima facie case of employment discrimination based upon wage disparity." RT 450:4-6, Appendix, p. 9-B. The district court then stated that the defendant had "failed to articulate legitimate reasons for the disparity in wages between the blacks and the whites." RT 450:13-14, Appendix, p. 10-B.

The district court's prima facie analysis allowed it to find a violation of Title VII from the mere fact of wage disparity. Rather than correct the district court, however, the Ninth Circuit's published opinion approves and endorses the district court's approach "because this Circuit requires district courts to provide

such specific findings in Title VII cases." Id.

### 2. The Ninth Circuit's Holding That A Mere Failure To Eliminate Wage Disparity Proves Intent To Discriminate Is In Conflict With Applicable Decisions of This Court.

The Ninth Circuit has effectively held that disparity in wages per se violates the civil rights laws. Its ruling is in direct conflict with this Court's ruling in Teamsters v. United States, 431 US 324, 97 S. Ct. 1843, 52 L.Ed. 2d 396 (1977), that proof of discriminatory intent or motive is critical in a case tried on a theory of disparate treatment.

The Ninth Circuit opinion establishes a quotable precedent that refusing "to bring black wages in line with those of whites," without more, "constitute[s] all the intent the court need[s] to find [an employer] guilty on a disparate treatment

theory." This astonishing conclusion is in direct conflict with this Court's holding in Personnel Administrator of Mass. v. Fenney, 442 US 256, 60 L.Ed. 2d 870, 99 S.Ct. 2282 (1979):

> "'Discriminatory purpose', however, implies more than intent as violation or intent as awareness of consequences. [Citation omitted.] It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of, not merely 'in spite of,' its adverse effects upon an identifiable group." 442 U.S. at 279.

The Ninth Circuit's reliance on Local 189, United Papermakers v. United States, 416 F.2d 980, 997 (5th Cir. 1969), is also erroneous, because that case has been repudiated by this Court. The language that the Ninth Circuit quoted from United Papermakers was expressed in support of a holding that a seniority system violated

Title VII because it perpetuated the effects of prior discrimination. Although this Court denied certiorari in United Paperworkers, 397 US 919 (1970), the holding of the case was repudiated in Teamsters v. United States, 431 U.S. 324, 52 L.Ed. 2d 396 (1977).[2] See also United Air Lines v. Evans, 431 553, 52 L.Ed. 2d 571 (1977), and American Tobacco Company v. Patterson, 456 US 63, 71 L.Ed. 2d 748 (1982).

The Ninth Circuit's opinion expresses a policy on an important question of federal law: that a finding of intentional discrimination may be based on nothing but an employer's refusal to eliminate wage disparities that have not otherwise been found to be unlawful. That conclusion should be reviewed by this Court and reversed.

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[2] The Fifth Circuit explicitly relied on United Papermakers in the Teamsters case. See United States v. T.I.M.E. - D.C., 517 F.2d 299, 315 (5th Cir. 1975).

Dated: July 13, 1984

Respectfully submitted,
ROBERT W. TOLLEN
BRONSON, BRONSON &
McKINNON

Robert W. Tollen

Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE: HONORABLE ROBERT P. AGUILAR, JUDGE

| | |
|---|---|
| EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,<br><br>PLAINTIFF,<br><br>VS.<br><br>INLAND MARINE INDUSTRIES,<br><br>DEFENDANT. | C-81-3115RPA |
| FLETCHER L. HOUSTON,<br><br>PLAINTIFF,<br><br>VS.<br><br>INLAND MARINE INDUSTRIES, RUDY SUTTON, DOUGLAS SUTTON, STANLEY SUTTON, AND DOES I THROUGH XXX,<br><br>DEFENDANTS. | C-81-4729RPA |

REPORTER'S TRANSCRIPT ON APPEAL
(Partial)

Wednesday, February 24, 1982

Reported by: Joseph M. Cassinelli, CSR
Official Reporter
U.S. District Court
San Francisco, California
94102

APPEARANCES:

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FOR THE DEFENDANTS INLAND MARINE, ET AL.:

Robert W. Tollen, Attorney at Law
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The Court orders, therefore, that the Rule 41(b) motions be granted as indicated and denied as indicated with respect to Mr. Houston.

Turning now to the Rule 41(b) motion regarding the claims of E.E.O.C., that motion is denied at this time.

Defendant is ordered to immediately prepare the appropriate findings and the appropriate order pursuant to the motion of Rule 41(b).

Now, Counsel, I grant that I have not heard all of the evidence insofar as I have not heard defendants' case.

I feel, however, that the plaintiffs have established a prima facie case under the E.E.O.C. claims, and it would be hard for me to understand what justification in law the defendants would have for the

disparity in wages paid to white employees as opposed to defendants' employees.

The Court is going to recess these proceedings at this time and order that counsel confer, meet and confer between now and 2 p.m., during which time the Court expects that there be a disposition of this case by way of settlement.

If there is none, the Court is seriously considering ordering a mistrial and ordering the matter to the magistrate for trial on the E.E.O.C. claims. We are talking about less than a thousand dollars. And the evidence, at least as presented now, indicates, I feel abundantly, that there was discrimination in the payment of wages predicated upon race.

And I grant again that we have not heard the defense of the defendants, but that is my preliminary thinking in this matter.

And I strongly suggest that counsel get together and work out some disposition.

Mr. Tollen: Your Honor.

The Court: Yes.

Mr. Tollen: The defendants' evidence will demonstrate conclusively that there is no discrimination on the basis of race.

The Court: All right. I understand that's your position and I understand what evidence I have already heard, but I am adamant in my position that it would be in the interests of all parties that you go out in the hallway and reach some kind of a disposition of this case.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE: HONORABLE ROBERT P. AGUILAR, JUDGE

| | |
|---|---|
| EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,<br><br>PLAINTIFF,<br><br>VS.<br><br>INLAND MARINE INDUSTRIES,<br><br>DEFENDANT. | C-81-3115RPA |
| FLETCHER L. HOUSTON,<br><br>PLAINTIFF,<br><br>VS.<br><br>INLAND MARINE INDUSTRIES, RUDY SUTTON, DOUGLAS SUTTON, STANLEY SUTTON, AND DOES I THROUGH XXX,<br><br>DEFENDANTS. | C-81-4729RPA |

REPORTER'S TRANSCRIPT ON APPEAL
(Partial)

Friday, February 26, 1982

Reported by: Joseph M. Cassinelli, CSR
Official Reporter
U.S. District Court
San Francisco, California
94102

APPEARANCES:

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FOR THE DEFENDANTS INLAND MARINE, ET AL.:

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The Court: Thank you.

Is the matter submitted?

Mr. Tollen: Submitted.

Mr. Offen-Brown: Yes, Your Honor.

The Court: All right.

The Court has heard all of the testimony and reviewed all of the evidence and exhibits which have been admitted in evidence in these proceedings.

The Court has heretofore rendered a decision with respect to a motion pursuant to Rule 41(b) with respect to all of the causes of action of plaintiff's complaint, except the first cause of action.

The Court has allowed the plaintiff Houston to intervene in the E.E.O.C. action, and the court has consented to the dismissal of the E.E.O.C. action except as it relates to Mr. Houston.

With respect to the Title VII claim which is framed in the E.E.O.C. action in which plaintiff is an intervenor, the Court finds that in order for plaintiff to establish a showing of a violation under Title VII, he must show that persons of one race are treated differently than similarly situated persons of another race.

The evidence shows that Mr. Houston is a black man, and that there were other employees, black and white, and that there was a disparity in the wages between the blacks and the whites.

In addition to showing what I have indicated for a Title VII action, the plaintiff must show that the defendant has no adequate explanation for the difference in the disparity and wage treatment.

The court finds that plaintiff has established a prima facie case of employment discrimination based upon wage disparity.

The defendant then has the burden of going forward with the evidence to rebut the inference of racially-based wages disparities, because there has been established a prima facie case by the plaintiff.

The Court finds that the defendant has failed to meet that burden of justification. In other words, the defendant has failed to articulate legitimate reasons for the disparity in wages between the blacks and the whites.

The Court finds that the informal system which was used at Inland Marine which allows the foreman and others to set wages without reference to any specific objective criteria is such that it lends itself to racial discrimination, and that it here clearly did constitute racial discrimination.

The Court in reaching that decision applied the rule that the Court must closely

scrutinize the explanation for the wage disparities offered by the defendants. The Court recognizes and finds that Doug Sutton is a fine person, that he did not personally discriminate against any blacks. I think the evidence militates against such a finding, where he is willing to dip into his own personal funds, in what the Court interprets to mean and to be an act of charity on his part to overcome an act of discrimination on the part of his employer, that he would be willing to rectify such a result which he felt to be unjust.

Further, the Court finds that the five-pronged criteria which is set forth in the case of Rowe vs. General Motors Corporation was clearly met here by the plaintiffs. It would, therefore, be unfair for this Court to permit the defendants to take advantage of its vague and subjective wage-setting policies.

The Court therefore finds that the plaintiff is entitled to his back wages by virtue of the disparity in wages, which is at $193.65 plus $75, which the court finds to be the sum of money which was given by Douglas Sutton to Mr. Houston, by way -- and the Court finds that it was by way of severance pay, for a total of back wages of $268.65, interest thereon from June 30th at the rate of 12 percent.

The Court now addresses the question in the first cause of action of plaintiff's complaint, that is, the cause of action which sounds in violation of 42 United States Code 1981, which is one for discrimination in employment, which discrimination gave rise to humiliation and ridicule.

The Court finds that there is testimony by the plaintiff that he suffered and

sustained humiliation and ridicule. There is no evidence to the contrary.

There being no evidence to the contrary, the Court must determine whether the testimony of Mr. Houston in the light of all of the surrounding facts would, in fact, give rise to humiliation and ridicule to a person similarly situated in the position of Mr. Houston.

And in reviewing some of the facts we take into consideration that Mr. Houston, by his testimony, is a black man with some education, who had prior federal employment. And the Court would take judicial knowledge of the fact that in federal employment there is at least a strong effort to avoid the presence of semblance of any form of racial discrimination which is in opposition to what is found out in the general market place employment.

And that he testified that because he was a war veteran, a war veteran who sustained injury in defending the flag of the United States of America, and that because he has a veteran's service connected disability, coupled with his feelings of patriotism, that he felt humiliated and ridiculed because he as a patriotic black veteran American was being treated in a manner different from the manner in which other whites were treated with respect to equal pay for equal employment, that he did sustain humiliation and ridicule.

There is, however, no testimony on behalf of the plaintiff to the extent to which this humiliation and ridicule affected his everyday life, his ability to function in a manner similar to the manner in which he functioned prior to sustaining the humiliation and ridicule.

He did not testify as to whether this caused any physical impairment to him or any mental anguish or mental impairment, other than it just caused him a lot of humiliation and ridicule. And the Court finds that most individuals similarly situated receiving this kind of treatment would feel humiliated and ridiculed upon learning that their fellow employees of the white race doing a similar task would be receiving higher pay.

However, the absence of the quantum of proof would cause the Court, one, to find humiliation and ridicule, but to not find the extent of damages prayed for by the plaintiff.

The Court finds that a reasonable damages, compensatory damages for the humiliation and ridicule is $500.

That leaves then the question of attorney's fees. And with respect to the question of attorney's fees, the Court is

going to order that matter submitted upon briefs. The briefs must contain, first, the plaintiff's opening brief, with an affidavit setting forth the schedule of time, costs and services rendered by plaintiff's counsel on behalf of plaintiff, and then a response by the defendant. Upon receipt of those briefs -- and I will set forth the briefing schedule now -- the Court will take the matter under submission and render its order. And I may or may not request that findings of fact and conclusions of law be prepared by counsel.

I might just prepare my own. But, I am reserving the option to order one of the parties to prepare them.

The briefing schedule will be as follows:

With respect to plaintiff's opening brief, that must be filed no later than March 12 at 4 p.m. Defendant's response

will be due March 26th at 4 p.m. and plaintiff's closing -- and, counsel, the only issue I want addressed is the matter of propriety of fees and the amount of fees, if any -- the closing brief of plaintiff will be April 2nd at 4 p.m.

All right. Those are the rulings and the findings of the Court. And, counsel, thank you very much for the presentation of your case and the cooperation that you gave to the Court with respect to the stringent time schedule that the Court had.

All right. I am going to stick to these time schedules with respect to the briefs. There will be no deviation from that at all.

The Court wants to make it very clear to Mr. Sutton, Sr., that the court does not find that there was a direct plan, scheme or design to discriminate against blacks, but the court finds that the system that was

used, together with the result that was accomplished, constitutes a form of racial discrimination. And the Court is not finding that the company actively set out a plan to discriminate against blacks, because there is no evidence of that.

But the law sets forth certain requirements that there should be some criteria for the proper determination of which employees receive which kind of salary. And the result just came out the wrong way here.

But, based upon that act of Congress and the courts -- the opinions of the courts as I read them and interpret them, I have made the findings that I have made.

All right.

We will be in adjournment, Mr. Davis.

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| FLETCHER L. HOUSTON,<br><br>Plaintiff,<br><br>v.<br><br>INLAND MARINE INDUSTRIES, et al.,<br><br>Defendants.<br><br>AND CONSOLIDATED CASE. | NO. C-81-4729 RPA<br>Consolidated with<br>No. C-81-3115 RPA<br><br>OPINION AND ORDER<br><br>[Entered<br>June 25, 1982] |

On February 26, 1982, this Court announced its Findings of Fact and Conclusions of Law in this case after a court trial, and rendered judgment for the plaintiff. The Court found that defendant Inland Marine Industries paid black employees less, in hiring and promotion, than defendant paid other employees for the same work and that such acts were

intentional. The Court held that this disparity in treatment violated section 701 et seq. of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and 42 U.S.C. §1981.

The Court also stated that it found no culpability on the part of Douglas Sutton, the foreman who was primarily responsible for determining wages, and no scheme or plan on the part of the company to discriminate. However, the Court did find that plaintiff had made out a prima facie case of disparate treatment, and defendant had failed to come forward with evidence sufficient to rebut the inference that defendant violated the statutes.

Defendant has moved for reconsideration and for judgment in its favor, arguing that the Court did not find the requisite "intent" to sustain a conclusion of "disparate treatment" under Title VII and of

discrimination under section 1981. In support of its argument, defendant points to the fact that the Court found no culpability on the part of the foreman and no scheme or plan by the company to discriminate. In contrast to defendant's motion, plaintiff has requested that the Court supplement its oral findings by explicitly finding intent on the part of the company to discriminate notwithstanding the fact that it had no scheme or plan to do so.

Title VII employment discrimination claims based on the subjective decision-making of an employer are analyzed under the "disparate treatment" model. Teamsters v. U.S., 431 U.S. 324 (1977). The presence of "intent" to discriminate on the basis of race, sex, or religion is an essential element of disparate treatment, as well as violations under section 1981. Williams v. Illinois, 665 F.2d 918 (9th Cir. 1982). A

clarification of the Court's ruling on intent will resolve the motions made by both parties.

"Intent" for the purpose of Title VII and section 1981 means discriminatory motive, or purpose. Teamsters, supra, at p.335. In Lynn v. Regents of the University of California, 656 F.2d 864, 1337 (1981), the Ninth Circuit recently elaborated on the intent requirement:

> [some] concepts reflect a discriminatory attitude more subtly; the subtlety does not, however, make the impact less significant or less unlawful. It serves only to make the courts' task of scrutinizing attitudes and motivation, in order to determine true employment decisions, more exacting. ... [W]hen plaintiffs establish that [employment] decisions are motivated by discriminatory attitudes relating to race or sex, or are rooted in concepts which reflect such discriminatory attitudes, however subtly, courts are obligated to afford the relief provided by Title VII. Lynn, supra, at p.1343 fn.5.

The Ninth Circuit has also recently asserted that the greater the subjective and discretionary element in an employer's decision, the greater the possibility of racial bias; and, therefore, the stronger the inference of intent in a plaintiff's prima facie case. O'Brien v. Sky Chefs, 670 F.2d 864, 867 (1982). See also, Rowe v. General Motors, 457 F.2d 348 (8th Cir. 1972).

Based on statistical evidence showing virtually uniform wage disparity and the highly subjective nature or the decision-making involved, this Court determined that plaintiff had made out prima facie case for disparate treatment. The burden then shifted to defendant to offer evidence to rebut the inference of intent. Having reconsidered the evidence, it is the finding of this Court that defendant has failed to

adduce evidence sufficient to rebut the inference of intent.

Despite the fact that the evidence exonerates foreman Douglas Sutton and dispels plaintiff's contention that the company acted with malice, the company intended to discriminate against its black employees within the meaning of Lynn. The company did not consciously set out to establish a two-tiered wage structure, and hence did not act maliciously; however, it cannot escape responsibility for the maintenance of that structure. The disparate wage structure developed over time, but defendant had been duly informed of this obvious disparity. Defendant had ample opportunity to adjust and correct the disparity, yet defendant acquiesced therein and chose to maintain it. It is the opinion of this Court that defendant was primarily motivated by subtle, but nevertheless

discriminatory attitudes, and thus is liable to plaintiff under Title VII and section 1981.

Having read and considered the papers submitted by all parties and the arguments therein, and having duly considered the oral arguments presented by counsel, the Court supplements its findings by this Order and affirms its judgment of February 26, 1982. Accordingly, defendant's motion for reconsideration is DENIED.

IT IS SO ORDERED.

Dated: June 24, 1982

ROBERT P. AGUILAR
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>INLAND MARINE INDUSTRIES,<br><br>Defendant-Appellant. | No. 82-4422<br>Civ. Nos.<br>81-4729-RPA &<br>81-3115-RPA |
| FLETCHER L. HOUSTON,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>INLAND MARINE INDUSTRIES; RUDY SUTTON; DOUGLAS SUTTON; STANLEY SUTTON; and DOES I through XXX<br><br>Defendant-Appellants. | O P I N I O N<br><br>[Entered<br>April 5, 1984] |

On Appeal from the United States District Court for the Northern District of California
District Judge Robert P. Aguilar, Presiding

Argued and Submitted February 13, 1984
Before: DUNIWAY, Senior Circuit Judge, and FARRIS and PREGERSON, Circuit Judges.

PREGERSON, Circuit Judge:

## INTRODUCTION

Inland Marine Industries (Inland Marine) appeals from a judgment of the United States District Court for the Northern District of California. The district court found that Inland Marine had violated Title VII of the Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1976), and 42 U.S.C. § 1981 (1976), by paying black employee Fletcher Houston a lower hourly wage than it paid white employees performing the same work. The court awarded Houston $268.85 in backpay, $500 in compensatory damages, $702.17 in court costs, and $7,500 in attorneys' fees.

At trial, Houston successfully contended that during the relevant period, Inland Marine never paid any of its 6 black employees more than it paid its 4 white employees. He also convinced the district court that Inland Marine ratified this disparity when its foreman, acting on the

directive of the proprietor, failed to raise black workers' pay to parity, even after Houston and another black employee had twice complained about wage discrimination.

On appeal, Inland Marine contends that the court made two mistakes.

First, the company says that the district court confused disparate treatment with disparate impact analysis,[1] and improperly found for Houston by combining mutually exclusive elements of the two theories. In a disparate treatment case, plaintiff must prove that the employer intended to discriminate. Inland Marine argues that the district court's opinion exonerates company officials of the requisite intent, and that the court's finding of discrimination rests solely on the statistical wage differences--an analysis permissible only on a disparate impact theory. We need not, however, consider the applicability of a disparate

impact analysis to these facts, because we may affirm the district court's finding of discrimination on disparate treatment grounds.[2]

Second, Inland Marine claims that no matter what the district court found, company officials lacked a discriminatory purpose as a matter of law. In the absence of such intent, Inland Marine argues, the district court may not find the employer guilty of violating Title VII.

For the reasons that follow, we reject these arguments and affirm.

## FACTS

### A. Hiring at Inland Marine

Inland Marine builds shipping berths and sells them primarily to the Navy. During the spring of 1980, Inland Marine rented a warehouse in Alameda to assemble

berths sold under a large order. The sole proprietor put his son Douglas Sutton (Sutton) in charge of the assembling.

In March and April, Sutton hired 10 men to help assemble the berths and perform other tasks at the Alameda warehouse.[3] Sutton hired 6 blacks, all referred by the California Employment Development Department (EDD). Without exception, he started them at an hourly wage of $4.50.

Sutton also hired 4 white workers: Louis Runnestrand, Daryl Dennis, Paul Skarry, and John Marksman.

On March 17, on the recommendation of a carpenter already on the payroll, Sutton hired Runnestrand to perform carpentry work at $5.00 per hour.

On March 19, on Runnestrand's recommendation, Sutton hired Dennis to assemble berths at $5.00 per hour. Sutton initially offered $4.50, but Dennis demanded

more and Sutton, after talking to Dennis and determining that he was an intelligent person possessing a potential for advancement, offered $5.00. Later, after another employee pointed it out, Sutton observed that Dennis brought his own tools to work and awarded Dennis a raise of indeterminate amount.

On March 25, Sutton needed additional manpower for a last-minute task. He hired Skarry to help load a container at $5.00 per hour. Skarry was not a very good worker, so Inland Marine later fired him.

Finally, on April 16, Sutton hired Marksman. Before setting Marksman's pay, however, Sutton permitted Marksman to work a 17-hour day. Sutton was so impressed by the work that he gave Marksman $5.00 per hour, and later raised it to $5.50.

Sutton hired black referrals from the EDD on April 8 (one man), April 9 (two men), and April 24 (plaintiff-appellee

Houston and three other men). He paid every man $4.50 per hour. In no case did he offer more money or provide the black workers with an opportunity to demonstrate their intelligence, purchase their own tools, work longer days, or do other things to earn raises.

Houston and another black worker complained to Sutton about the wage disparity. Sutton acknowledged the differences[4] But instead of ordering pay hikes for all blacks, Sutton awarded 25¢ per hour raises only to the two men who complained. Moreover, Sutton simultaneously ordered a 50¢ raise for Marksman.
When Houston and his companion complained a second time, Sutton paid them the difference between $4.75 and $5.00 per hour--but out of his own pocket, with personal checks.
He failed, however, to make up this

difference for the other black workers, or to pay any other workers with personal checks.

Based on these facts, Houston charged that Inland Marine had used subjective wage-setting criteria to violate both Title VII[5] and § 1981.[6] The EEOC filed a Title VII class action on behalf of Houston and other blacks, and Houston filed an individual action under § 1981. After the EEOC settled the class action with the employer, Houston obtained leave to intervene and pursued his individual claims under both Title VII and § 1981.

At trial, Inland Marine contended that Sutton's father, the proprietor, had instructed his son to pay no more than $4.50 per hour, and that the company set this new policy in advance of hiring the EDD referrals. Inland Marine also offered

evidence that Sutton had many black friends and acquaintances, and did not treat black people badly.

B. District Court's Findings

In a 4-page opinion, the district court reaffirmed its earlier, oral ruling that Inland Marine had "paid black employees less, in hiring and promotion, than defendant paid other employees for the same work and that such acts were intentional." Houston v. Inland Marine Industries, Civ. No. 81-4729-RPA, slip op. at 1 (N.D. Cal. June 24, 1982) (unpublished opinion and order) (emphasis added). The court reasoned:

> Based on statistical evidence showing virtually uniform wage disparity and the highly subjective nature o[f] the decisionmaking involved, this Court determined that plaintiff had made out [a] prima facie case for disparate treatment. The burden then shifted to defendant to offer evidence to rebut the inference of intent. Having reconsidered the evidence, it is the finding of this Court

> that defendant has failed to adduce evidence sufficient to rebut the inference of intent.

Id. at 3.

But the court qualified its findings. It found "no culpability on the part of Douglas Sutton, the foreman who was primarily responsible for determining wages, and no scheme or plan on the part of the company to discriminate." Id. at 1 (emphasis added); see also id. at 2 (using similar language). The court added:

> Despite the fact that the evidence exonerates foreman Douglas Sutton and dispels plaintiff's contention that the company acted with malice, the company intended to discriminate against its black employees within the mean of Lynn[v. Regents of the University of California, 656 F.2d 1337, 1343 n.5 (9th Cir. 1981) (discussing subtle discrimination), cert. denied, 103 S. Ct. 53 (1982)]. The company did not consciously set out to establish a two-tiered wage structure, and hence did not act maliciously; however, it cannot escape responsibility for the maintenance of that structure....

Houston v. Inland Marine Industries, Civ. No. 81-4729-RPA, slip op. at 3 (N.D. Cal. June 24, 1982) (unpublished opinion and order). Still, the district court pointed to the wage disparity and noted that despite "ample opportunity to adjust and correct" the problem, Inland Marine had "acquiesced therein and chose to maintain it." Id. The court did not state that Sutton's father, the proprietor, was free from culpability.

The district court entered judgment for Houston in the amount of $768.85 plus costs and attorneys' fees, and Inland Marine appealed.

## STANDARD OF REVIEW

The principal question on review is whether Inland Marine, in setting wages, intended to discriminate against Houston and other blacks. The district court found that Inland Marine so intended. We may reverse

this finding only if we conclude that it is clearly erroneous under Fed. R. Civ. P.52(a). Pullman-Standard v. Swint, 456 U.S. 273, 287-88, 290 (1982); accord Wall v. National R.R. Passenger Corp., 718 F.2d 906, 909 (9th Cir. 1983); Piva v. Xerox Corp., 654 F.2d 591, 594 (9th Cir. 1981); Golden v. Local 55, International Association of Firefighters, 633 F.2d 817, 820 (9th Cir. 1980).

## ANALYSIS

### A. District Court's Approach

1. Definitions. The Supreme Court recognizes two theories under which plaintiffs may establish Title VII liability: disparate treatment[7] and disparate impact. Disparate treatment

> is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical,

> although it can in some situations be inferred from the mere fact of differences in treatment.

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (citations omitted) (emphasis added); see also B. Schlei & P. Grossman, Employment Discrimination Law 13 (2d ed. 1983) ("The essence of disparate treatment is different treatment: that blacks are treated differently than whites, women differently than men. It does not matter whether the treatment is better or worse, only that it is different.").

On the other hand, disparate impact claims

> involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.... Proof of discriminatory motive, we have held, is not required under a disparate impact theory.

Teamsters, 431 U.S. at 336 n.15 (emphasis added); see Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.").

The gravamen of Houston's complaint is that Inland Marine, relying on subjective wage-setting criteria, treated black employees differently from the way it treated white employees. Therefore, the district court properly analyzed this as a discriminatory treatment case. See, e.g., Heagney v. University of Washington, 642 F.2d 1157, 1163 (9th Cir. 1981).[8]

2. Allocation of proof.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), reaffirmed in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) [hereinafter the McDonnell Douglas/Burdine formula], the

Supreme Court set out the three-leg course that a Title VII plaintiff must successfully navigate to establish liability.

First, plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of racial discrimination. Second, if plaintiff succeeds in establishing a prima facie case, the burden of producing evidence shifts to defendant "to articulate some legitimate, nondiscriminatory reason" for the disparate treatment. McDonnell Douglas, 411 U.S. at 802. Finally, if defendant carries his burden, plaintiff must then have an opportunity to prove by a preponderance of the evidence that the employer's reasons were merely a pretext for discrimination. Burdine, 450 U.S. at 252-53, 255-56; McDonnell Douglas, 411 U.S. at 802-04; see EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1011-12 (9th Cir. 1983).

Of course, even though the McDonnell Douglas/Burdine formula shifts the burden of producing evidence, it never relieves plaintiff of his ultimate burden of proving discriminatory intent by a preponderance of the evidence. Burdine, 450 U.S. at 253 (citation omitted).

3. What the district court did. Relying on United States Postal Service Board of Governors v. Aikens, 103 S. Ct. 1478 (1983), Inland Marine argues that the district court conducted an improper analysis for two reasons. First, the court framed its opinion in terms of finding a prima facie case, rather than in terms of finding the ultimate fact of discriminatory intent.

Second, pointing to various passages in the court's opinion and order, see supra p. 6 (quoting opinion and order), Inland Marine adds that the court undercut its own disparate treatment analysis by

"exonerat[ing]" foreman Sutton and the company of discriminatory intent, while purporting nonetheless to find such intent in Sutton's refusal to bring the wages of Houston and other blacks in line with those of whites. The company contends, in essence, that the only way the court could have found the requisite intent on which to ground Title VII liability against Inland Marine was somehow to extract this intent from either the prima facie case alone, or from the disparate impact of wage decisions on blacks. The company reasons that the McDonnell Douglas/Burdine formula does not permit either approach in a disparate treatment case.

Inland Marine is wrong on both counts. The district court simply conducted the three-stage analysis that the McDonnell Douglas/Burdine formula requires. See supra p. 6 (quoting opinion and order). First, the court found that Houston's statistical

evidence--showing that during the period in question, no black ever earned more than any white--established a prima facie case. Second, the court noted that the burden of production shifted to Inland Marine to articulate a legitimate nondiscriminatory reason for the disparate treatment. The court concluded that Inland Marine failed to produce evidence "sufficient to rebut the inference of intent." Houston v. Inland Marine Industries, Civ. No. 81-4729-RPA, slip op. at 3 (N.D. Cal. June 24, 1982) (unpublished opinion and order). This finding properly concluded the inquiry and made it unnecessary for the court to proceed to the third stage of the formula. Instead, the court ruled that Houston had proved that Inland Marine violated the statute, because

> [t]he disparate wage structure developed over time, but defendant had been duly informed of this obvious disparity. Defendant had ample opportunity to adjust and correct the disparity, yet defendant acquiesced therein and

> chose to maintain it. It is the opinion of this Court that defendant was primarily motivated by subtle, but nevertheless discriminatory attitudes, and thus is liable to plaintiff under Title VII and section 1981.

Id. at 3.

This analysis did not, as Inland Marine contends, confuse disparate treatment with disparate impact. It is nothing more than a straightforward application of the McDonnell Douglas/Burdine formula.

Aikens, therefore, is inapposite. There the Supreme Court criticized the court of appeals for discussing at length whether plaintiff had made out a prima facie case when the real question, on appeal from a full trial on all the evidence, was whether plaintiff had proved discriminatory intent. Aikens, 103 S. Ct. at 1481 ("Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a prima facie case.

We think' ... they have unnecessarily evaded the ultimate question of discrimination vel non." (footnote omitted)).

In the case before us, the district court did address this ultimate question. To the extent the district court spoke of finding a prima facie case, it did so because this Circuit requires district courts to provide such specific findings in Title VII cases. See, e.g., Peters v. Lieuallen, 693 F.2d 966, 969 (9th Cir. 1982).

B. District Court's Findings of Intent

The district court repeatedly says that it found Inland Marine guilty of intentional discrimination. E.g., Houston v. Inland Marine Industries, Civ. No. 81-4729, slip op. at 1, line 23 (N.D. Cal. June 24, 1982) (unpublished opinion and order); id. at 3, lines 14, 17, 27, 28-30.

The court thought that this discrimination was "subtle," id. at 3, line 28, but intentional nonetheless.

Yet Inland Marine asserts that the district court "exonerate[d]" foreman Sutton from all intentional wrongdoing. Inland Marine, however, misreads the court's opinion. Far from declining to find intentional discrimination, the court ruled that Inland Marine had discriminated without "malice." Id. at 3, line 17. The court's finding that this discrimination manifested itself subtly, rather than through the "culpability" of the foreman, id. at 1, line 27; id. at 2, line 7, or through a "scheme or plan," id. at 1, line 29; id. at 2, line 7, does not diminish the fact that the court did find intentional discrimination,. See Taylor v. Teletype Corp., 648 F.2d 1129, 1133 n.7 (8th Cir.), cert. denied, 454 U.S. 969 (1981).[9]

The requisite intent lay in Douglas Sutton's two-time refusal, at his father's behest, to bring the blacks' hourly wages in line with those of whites. When Houston and a co-worker first complained, Sutton raised their wages 25¢ per hour--still 25¢ short of the wages he paid white workers. Later, when the two black men complained again, Sutton paid them out of his own pocket, but simultaneously raised at least one other white worker 50¢. And in any event, when Sutton did act, he confined his actions to satisfying only the men who complained. At no time did he or his father attempt to institute across-the-board changes to correct a systemic inequity in wages.

By refusing to change his subjective wage-setting policies or to bring black wages in line with those of whites, Sutton ratified the existing disparities. His ratification constituted all the intent

the court needed to find Inland Marine guilty on a disparate treatment theory. See Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 997 (5th Cir. 1969) (per Wisdom, J.) ("The requisite intent [to discriminate] may be inferred from the fact that the defendants persisted in the conduct after its racial implications had become known to them."), cert. denied, 397 U.S. 919 (1970); McNeil v. McDonough, 515 F.Supp. 113, 129 (D.N.J. 1980) (under an ancient rule, courts consider conduct invading others' rights, though innocent when undertaken, as intentional if the actor fails to correct the problem after someone has pointed it out to him (citation omitted)), aff'd per curiam, 648 F.2d 178 (3d Cir. 1981).[10]

In today's world, racial discrimination sometimes wears a benign mask. See Lynn v. Regents of the University of California, 656 F.2d 1337, 1343 n.5 (9th

Cir. 1981), cert. denied, 103 S. Ct. 53 (1982). Current practices, though harmless in appearance, may hide subconscious attitudes, McNeil v. McDonough, 515 F.Supp. at 129, and perpetuate the effects of past discriminatory practices, Schnapper, Perpetuation of Past Discrimination, 96 Harv. L. Rev. 828, 834, 838 (1983). Although subjective employment criteria are not illegal per se, e.g., Heagney v. University of Washington, 642 F.2d 1157, 1163 (9th Cir. 1981); Ward v. Westland Plastics, Inc., 651 F.2d 1266, 1270 (9th Cir. 1980) (per curiam), courts should examine such criteria very carefully to make certain that they are not vehicles for silent discrimination, e.g., O'Brien v. Sky Chefs, Inc., 670 F.2d 864, 867 (9th Cir. 1982) (citation omitted).

The district court carefully analyzed Inland Marine's subjective wage-setting practices and found intentional

discrimination. This finding was not clearly erroneous. Therefore, we AFFIRM the judgment in all respects.

FOOTNOTES

1 Under a disparate treatment theory, plaintiff must prove that the employer intended to treat him differently from the way it treated other employees performing the same work. Under a disparate impact theory, plaintiff must merely prove that the employer's use of a purportedly neutral employment practice had the effect of harming plaintiff. Intent need not be proven. See infra pp. 7-8; International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

2 In his brief, Houston argues that we may affirm on a disparate impact theory. But Houston has pursued the case all along as a disparate treatment claim. Moreover, the district court placed its findings in a disparate treatment framework. Therefore, we think the case is best analyzed as a disparate treatment claim.

3 Inland Marine rehired or reassigned 10 additional employees from its other operations to the Alameda plant. Although Houston alleges that among these individuals, the lowest-paid were uniformly minorities, these other 10 workers are not the focus of his complaint.

4 Douglas Sutton testified as follows:

Q. Okay. He [Houston] said it had come to his attention that the black people were getting more than the white people?

A. Right. The other way around. The black people were getting less than the white people.

Q. Right. What did you say, go on with the conversation.

A. I had to stop and think about it for a minute and I realized that had never come into me.

I mean, that was [a] pretty heavy accusation right there and I was kind of "Wait a minute," and I said, I thought about it and I said, "That's right, that's true." And he brought out a couple of people--and brought up a couple of people and he said why is this guy making this kind of money?

And I said, well, he is working longer than you and he said, "How about this guy Marksman?" And I said, "Well, I think Marksman is a pretty good worker."

And he said, "Well, I am a pretty good worker." And I always thought Mr. Houston was a satisfactory worker, but I didn't think he was anything like this other guy. And, he says, "Well, you are trying to tell me he is worth $5.50 and I am only worth $4.50?"

. . . .

Q. In [] answer[] to his statements that the whites were making more than the blacks, what did you say?

A. I said that's true.

Record at 312-14.

5 Title VII, in relevant part, makes it an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's

race, color, religion, sex, or national origin...." 42 U.S.C. § 2000e-2(a)(1) (1976).

6 Section 1981 gives "[a]ll persons" the same right "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens...." 42 U.S.C. § 1981 (1976).

7 A plaintiff must meet the same standards in proving a § 1981 claim that he must meet in establishing a disparate treatment claim under Title VII, that is, he must show discriminatory intent. See General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391 (1982). Therefore, our discussion of Houston's Title VII claim also applies to his § 1981 claim.

8 See supra note 2.

9 In Taylor, the Eighth Circuit recognized that some confusion could result from the district court's decision to award a Title VII judgment to plaintiff despite the lower court's finding that "[t]here is no showing that the disparate impact of layoffs and demotions in 1975 was the result of a conscious effort to harm blacks as such." Taylor v. Teletype Corp., 648 F.2d at 1133 n.7 (citation omitted).

Viewing the record as a whole, however, the Eighth Circuit concluded:

> [W]e believe that the court merely expressed its belief that no direct evidence of conscious or malicious racial animus had been presented. The court found, and we agree, that sufficient evidence existed to allow the court to make the necessary inference of discriminatory racial motivation.

Id.

10 See also Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1007 (9th Cir. 1972) (Employer's continued reliance on state labor code provision, which had been struck down because it discriminated on the basis of sex, "could no longer be considered to be in good faith."); cf. Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975) ("Where an employer [has] shown bad faith--by maintaining a practice which he knew to be illegal or of highly questionable legality--he can make no claims whatsoever on the Chancellor's conscience."); Shah v. Mt. Zion Hospital & Medical Center, 642 F.2d 268, 271 (9th Cir. 1981) (Plaintiff "did not demonstrate that Mt. Zion knew of and failed to remedy any training deficiencies.").